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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-454

CALVIN LOUIS BRANNON, *Petitioner,*

v.

THE STATE OF NORTH CAROLINA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

Calvin Louis Brannon, petitioner herein, prays that a writ of certiorari issue to review the judgment of the North Carolina Court of Appeals, an appeal and petition for a writ of certiorari therefrom having been dismissed by the Supreme Court of North Carolina by judgment entered June 26, 1975.

CITATION TO OPINION BELOW

The original opinion of the Supreme Court of North Carolina dated June 26, 1975, has been reported in 287 N. C. 665. This opinion appears in the Appendix hereto as Exhibit A.

The judgment of the North Carolina Supreme Court dismissed the appeal of the petitioner from an adverse opinion of the North Carolina Court of Appeals, which opinion is hereto attached as Exhibit B. The opinion of the North Carolina Court of Appeals is reported in 25 N.C. App. 635, 214 S.E.2d 213.

JURISDICTION

The judgment of the Supreme Court of North Carolina is dated June 26, 1975, and was entered on the same day. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the State can violate the doctrine of the fruits of the poisonous tree by refusing to consider evidence of an illegal search not disclosed in the affidavit for the search warrant but disclosed by the evidence?

2. Can the State violate the petitioner's constitutional right against unreasonable search and seizure, guaranteed by the Fourth Amendment to the Constitution of the United States, by validating a search warrant issued more than twelve hours prior to the search warrant affidavit?

3. Can the petitioner show that the allegations of a search warrant affidavit are false?

STATEMENT OF CASE

This action was commenced by a warrant issued for the arrest of the petitioner, Case Number 72CR47396, on November 21, 1972, by the Deputy Clerk of Superior Court of Forsyth County upon the sworn complaint

of George O. Gunter dated November 21, 1972 which complaint and warrant reads as follows:

HISTORY OF THIS LITIGATION

Complaint for Arrest

The undersigned George O. Gunter, being duly sworn, complains and says that at and in the county named above and on or about the 21st day of October, 1972, the petitioner named above did unlawfully, willfully, and feloniously steal, take, and carry away three dogs, to wit: two black and tans, both approximately 6 years of age, one answering to the name of Jack and the other Fireball, and one treeing walker answering to the name of Drummer Boy, age 15 months, value of the dog named Jack being $350.00, Fireball being $200.00 value, and the dog named Drummer Boy being $200.00, the property of George O. Gunter.

The offense charged here was committed against the peace and dignity of the State and in violation of law G. S. 14-84.

Warrant for Arrest

To any officer with power to execute an arrest warrant for the offense describe above:

It appearing from the accusations recited in the above complaint, which is made a part of this warrant, that a criminal offense has been committed, you are commanded forthwith to arrest the petitioner named above and bring him before 21st District Court, Criminal Division, Winston-Salem, N. C. to be dealt with according to law.

This the 21st day of November, 1972.

The warrant upon the complaint of George O. Gunter was served by arresting the petitioner on November 27, 1972.

This warrant was consolidated for the purpose of trial by presiding Forsyth County District Court Judge, Robert K. Leonard, on January 11, 1973 and after trial of the petitioner upon his pleas of not guilty as to both of the charges in the warrants before presiding District Court Judge, Robert L. Leonard, the petitioner was found guilty and the warrants consolidated for the purpose of sentence and the petitioner sentenced to be imprisoned in the jail of Forsyth County for 18 months and assigned to North Carolina Department of Corrections on January 11, 1973.

From the foregoing Judgment of District Court Judge, Robert K. Leonard, of Forsyth County, the petitioner appealed to the Superior Court of Forsyth County on January 11, 1973.

The petitioner was tried at the regular term of the Superior Court of Forsyth County that began the 4th day of June, 1973.

The trial commenced June 4, 1973 and both of the warrants set forth in the jurisdiction of the court were consolidated for the purpose of trial and the charges in both warrants were tried at one and the same time.

Before the petitioner was arraigned, he made a motion to suppress the evidence obtained on October 22, 1973 because of illegal search and the presiding judge stated that the motion to suppress would be considered when the objection is made during the trial.

The petitioner entered a plea of not guilty to each charge contained in the warrants and was tried by a judge and jury.

The petitioner was found guilty by the jury on the charges contained in each of the warrants set forth in

the jurisdiction of the court and from the judgments entered appealed to the Court of Appeals of North Carolina.

The Court of Appeals of North Carolina reversed as to the other charge, and granted a new trial of the charge of larceny of the Gunter dogs in Case 72CR-47396 in decision recorded in 21 N.C. App. 464, 204 S.E.2d 895 (1974).

The petitioner on August 23, 1974 filed a motion to suppress in Case 72CR47396 the dog leash and any and all evidence seized by officers on October 22, 1973 from the petitioner's vehicle as follows:

Motion to Suppress

The petitioner, Calvin Louis Brannon, moves to suppress one leather dog leash and any and all evidence seized by officers on October 22, 1973 from the petitioner's vehicle for violation of his Constitutional rights under the Fourth and Fourteenth Amendments to the Constitution of the United States as follow:

(1) The arrest warrant under which the officers proceeded was void.

(2) The arrest warrant upon which the officers proceeded was not supported by sufficient affidavit and evidence.

(3) The search warrant under which the officers proceeded was based on a false affidavit and invalid.

(4) That the evidence used as a basis for the search warrant was obtained illegally and the search warrant and any seizures thereunder are fruits of the poisonous tree.

(5) The vehicle illegally searched was within the curtilage of the petitioner's home.

(6) The search warrant was improperly executed and issued.

(7) The search was not incident to a valid arrest.

(8) The arrest of petitioner was invalid.

(9) The officer who made the original search was a Forsyth Deputy Sheriff searching in Rowan County and without authority and jurisdiction.

(10) Petitioner's Constitutional rights were not waived.

This the 25th day of July, 1974.

By: IRVIN B. TUCKER, JR.
Attorney for the Petitioner

On August 23, 1974, a voir dire hearing on a motion to suppress evidence by the petitioner was heard before Judge Exum, regular Judge of the Superior Court of Forsyth County, assigned to hold the courts of the 21st Judicial District composed of Forsyth County.

After the voir dire hearing, Judge Exum made findings of fact and conclusions of law and denied the petitioner's motion to suppress. The petitioner excepted. R. pp. 39-45.

The petitioner entered a plea of not guilty to the charge of larceny of the Gunter dogs in Case 72CR47396 as set forth in the warrant and was tried by a judge and a jury.

The petitioner's conviction and sentence of imprisonment was affirmed by the North Carolina Court of

Appeals. (Appendix, Exhibit B) The opinion of the North Carolina Court of Appeals stated:

> "Therefore, since the search warrant is valid on its face and the sworn allegations in the affidavit are sufficient to establish probable cause, it is not necessary for us to discuss the validity of the allegations in the affidavit or the credibility of the affiant. We hold the search of the defendant's automobile and the seizure of the leather dog leash pursuant to the search warrant was proper and the trial court did not err in denying the defendant's motion to suppress the evidence."

In the petitioner's brief to the Court of Appeals, the petitioner argued at length that the leather dog leash seized from the locked trunk of the petitioner's automobile, (while the automobile was in the yard of the petitioner's mother—where the petitioner also lived) was illegal, in violation of the petitioner's rights under the Fourth and Fourteenth Amendments of the Constitution of the United States (petitioner's brief filed with the North Carolina Court of Appeals, pp. 6-36). The petitioner appealed to the Supreme Court of North Carolina on the grounds that the petitioner's right against unreasonable search and seizure guaranteed by the Fourth Amendment to the Constitution of the United States made obligatory on the states by the Fourteenth Amendment was violated and set forth eighteen reasons why the petitioner's Constitutional rights had been so violated.

The petitioner's notice of appeal to the Supreme Court of North Carolina is hereto attached and marked "Exhibit C."

The petitioner, to support his appeal to the Supreme Court of North Carolina, filed a supplementary brief in

which he pointed out to the Supreme Court of North Carolina his contention that the Court had violated his rights guaranteed by the Fourth and Fourteenth Amendments of the Constitution of the United States by admitting evidence of the leash found locked in the trunk of the petitioner's automobile, while the automobile was in the yard of the petitioner's mother, where the petitioner also lived. The petitioner, in support of his appeal to the Supreme Court of North Carolina, referred that Court to the argument of petitioner in his brief filed with the North Carolina Court of Appeals and in addition, called the Court's attention to *Coolidge* v. *New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971), which stated that the "plain-view" doctrine may not be extended to a general exploratory search. The petitioner also called to the attention of the North Carolina Supreme Court that the "plain-view" doctrine does not apply where the incriminating nature of the evidence discovered was not apparent by a mere inspection, Annot., 29 L.Ed.2d 1067 at Page 1073, concerning *Stanley* v. *Georgia,* 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969), Page 571 (petitioner's supplementary brief upon appeal to the Supreme Court of North Carolina, p. 5).

The petitioner also filed a petition for certiorari with the Supreme Court of North Carolina in which the petitioner pointed out that:

1. The decision of the North Carolina Court of Appeals sets a precedent barring the petitioner from showing that the facts set forth in the affidavit to establish probable cause for the issuance of the search warrant was illegally obtained and is against the authoritative decisions of the United States Supreme Court and should not be allowed to become the law of the State of North Carolina.

The petitioner's petition for certiorari to the Supreme Court of North Carolina pointed out that if the decision of the North Carolina Court of Appeals in this case is allowed to stand and become a precedent, then the State will be able to use illegally obtained evidence as a basis for a search warrant by merely failing to state the facts in the affidavit which would show the illegality and thus use the fruits of the poisonous tree or illegally obtained evidence contrary to the decision of this Court in *Silverman* v. *United States,* 365 U.S. 505, 5 L.Ed.2d 734, 81 S.Ct. 679 (1961), *Wong Sun* v. *United States,* 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963), *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385, 64 L.Ed.2d 319, 40 S.Ct. 182 (1920).

2. That the decision of the North Carolina Court of Appeals validated a search warrant which showed on its face that the search warrant was issued almost 12 hours before the affidavit.

3. That the holding of the North Carolina Court that the petitioner could not show facts which disclose statements in the affidavit are untrue is against the reasoning of the more authoritative and better opinions and the rule generally followed in federal court. The federal rule that should be followed was pointed out to the North Carolina Supreme Court as *United States* v. *Hunt,* 396 F.2d 888 (5th Cir. 1974).

On June 26, 1975, the petitioner's appeal and his petition for writ of certiorari upon motion of the Attorney General was dismissed. (Appendix, Exhibit A)

RELEVANT FACTS

On voir dire held by the Court on the defendant's Motion to suppress, the following facts were developed:

On the 21st day of October, 1972, George O. Gunter was in possession of two dogs and the owner of one dog.

The dogs were coon hounds. The last time Gunter saw the dogs was when he put them in a dog box, which was on the back of his pickup truck around 7:00 or 7:30 p.m. (R. p. 24).

One of the dogs was owned by George O. Gunter's brother and had a homemade leash on him (R. p. 24).

Gunter put the dogs into the box and went into the house to drink a cup of coffee and get some more clothes preparatory to going hunting. When he came back, he found that the tailgate of the truck was down and the dogs were gone (R. p. 24).

After Gunter missed the dogs, he called the Sheriff's Department and reported the dogs as stolen to Mr. Weaver (R. p. 25).

George O. Gunter lived in Winston-Salem, North Carolina (R. p. 24), and he and Mr. Weaver got in touch with Chief of Police Paul Wilson in East Spencer and went to the location of Mr. Brannon's mother's house (R. p. 25).

Michael Gray Weaver was a Deputy Sheriff of Forsyth County. East Spencer is in Rowan County (R. p. 13).

Forsyth Deputy Sheriff Weaver and East Spencer Chief of Police Wilson went to Mrs. Brannon's house and stated that they had a warrant for Calvin Brannon and asked her if they could look through the house; and she stated, "Yes" (R. pp. 10, 13).

Chief of Police Wilson of East Spencer remained in the house while Forsyth County Deputy Weaver went outside and searched. Chief of Police of East Spencer was not with either George O. Gunter or Deputy Sheriff

Weaver of Forsyth County when the leash was first seen in the trunk (R. pp. 17, 21).

Forsyth County Deputy Sheriff Weaver searched around the back of the house where Calvin Brannon and his mother lived (R. p. 11).

The defendant lived with his mother, Hattie Brannon, in East Spencer in Rowan County on October 21 and 22 of 1972 (R. pp. 32, 33).

The defendant's 1965 Oldsmobile, when Officer Weaver searched it in the backyard, was where it was usually parked. There was a chain-link fence along the street pavement, and the fence went around the house and took a right angle. Just beyond the car was a pony stable and just between the car and the next street was a chicken lot owned by Mrs. Brannon. The defendant's car was a white 1965 Oldsmobile and on that night was in the approximate position as shown on defendant's voir dire 2 (R. p. 35).

While Chief of Police of East Spencer was in the house with Mrs. Hattie Brannon, Forsyth County Deputy Weaver searched the defendant's 1965 Oldsmobile, which was sitting within the curtilage of the home where he and his mother lived (R. pp. 11, 12).

George O. Gunter was brought over and shown the leash through a hole in the car trunk but could not identify it at that time (R. pp. 27, 28).

At the time George O. Gunter and Forsyth County Deputy Sheriff Weaver made the illegal search of the defendant's automobile, within the curtilage of the backyard of the defendant and his mother's home, the officer was proceeding under a void warrant that charged that the defendant on September 26, 1972, did

unlawfully, willfully, and feloniously attempt to commit a felony, to wit: larceny; to unlawfully, willfully, and feloniously steal, take, and carry away two coon dogs of George O. Gunter, of the value of THREE HUNDRED FIFTY ($350.00) DOLLARS, with the felonious intent to permanently deprive the owner thereof and convert the same to his own use (R. pp. 15, 31).

There were no findings of fact of any kind set forth in the Complaint which was a basis of the arrest warrant (R. p. 31).

After Officer Weaver and George O. Gunter had illegally searched the defendant's vehicle parked within the curtilage of his dwelling, they in company with Paul Wilson, Chief of Police of East Spencer, went to the Magistrate in Salisbury, North Carolina, and obtained a search warrant (R. pp. 14, 26).

Gunter, Chief Wilson, and Deputy Weaver all went to Salisbury (R. pp. 14, 26).

The search warrant for the defendant's white Oldsmobile stated that a leather dog leash, which had been used in the commission of crime of larceny of dogs, was located in the defendant's automobile at the residence of the defendant and his mother; and that the facts upon which this information was based, was obtained from "personal information from George O. Gunter, 2124 New Walkerton Road, Winston-Salem, North Carolina, owner of the property in question who has seen the property in question and subject's vehicle at the above location" (R. pp. 28, 29).

George O. Gunter testified at the first trial that he did not look into the car trunk until it was opened, and that was when the officers came back with the search

warrant; until then he did not get close to the car or look into it (R. p. 32).

The best that Gunter could do at the second trial after listening to the officers testify, was to change his testimony to state that he did see into the car trunk through the hole in the trunk while the car was in the defendant's backyard and within the curtilage and before the search warrant was obtained; but he did not recognize the leash and identify it as set forth in the Affidavit from which the search warrant was obtained, and he did not tell the officers that the leash was his at the time (R. p. 27).

The search warrant was improperly executed since Paul Wilson, the Affiant, signed the warrant as Magistrate (R. p. 30).

The warrant was executed at 1:20 a.m., but the Affidavit upon which the warrant was based was not sworn to until 1:30 p.m. The warrant was issued without any Affidavit at all (R. pp. 28, 29).

The return on the search warrant discloses that it was served on October 22, 1972, at 2:00 a.m., taking into custody a leather dog leash (R. p. 30). At the time the officers and Gunter went for the search warrant, Calvin Brannon had not been seen. When the officers got back with the search warrant, he was there out in the street (R. pp. 21, 22).

After the defendant was put under arrest under the void arrest warrant, the officer stated that he gave permission to search the vehicle and gave the conclusion that he helped; however, the officers were unable to state any act that the defendant did to help unlock the trunk except to say, "Go ahead, open it. Do it; you can do

what you want to," and, "Let's go over there and open it." (R. pp. 19, 22).

After the defendant had been arrested and then served with the search warrant, the vehicle standing within the curtilage of defendant and his mother's home was searched; and the trunk was again opened and the dog leash identified by Gunter was seized (R. pp. 19, 20).

Forsyth County Deputy Sheriff Weaver after making the illegal search of the defendant's vehicle, within the curtilage of his home by opening the trunk of the vehicle and observing and getting out the leash, put the leash back in the hopes that they could then go get a search warrant and make legal what they had already done illegally (R. p. 16).

Mary B. Thompson and Vera Brannon testified that the defendant did not give the officers permission to search (R. pp. 35, 38).

Hattie H. Brannon, mother of the defendant, testified that she did not give the officers permission to search anywhere before they obtained the search warrant (R. pp. 32, 33).

The Gunter dogs were never found (R. p. 23).

The leash identified as State's Exhibit Number One was introduced into evidence under a continuing objection allowed the defendant by the Court (R. p. 45).

REASONS FOR GRANTING WRIT

I. The decision of the North Carolina Supreme Court dismissing the appeal and the petition for certiorari to the North Carolina Supreme Court, from the decision of the North Carolina Court of Appeals

is in conflict with the applicable decisions of this Court.

1. The decision allowed the illegally obtained evidence which is barred as the fruits of the poisonous tree to be introduced into evidence against the petitioner.

The doctrine of the fruits of the poisonous tree has become a part of our jurisprudence and must remain so if a rule of law is to continue in this great land of ours. This decision ignores this salutary doctrine and it is unthinkable that it should be allowed to stand.

The petitioner was convicted by the introduction of a homemade dog leash into the evidence in spite of the petitioner's motion to suppress (R. pp. 5, 6) and objection to the evidence (R. p. 45).

The evidence disclosed that Officer Weaver and George O. Gunter had illegally searched the petitioner's vehicle parked within the curtilage of his dwelling and that after the illegal search, they (in company with Paul Wilson, Chief of Police of East Spencer) went to the magistrate in Salisbury, North Carolina and obtained a search warrant (R. pp. 14, 26).

The authority for the original search by George O. Gunter and Forsyth County Sheriff Weaver of the petitioner's automobile within the curtilage of the backyard of the petitioner's mother's home, was a warrant that charged that the petitioner, on September 26, 1972, did unlawfully, willfully, and feloniously attempt to commit a felony, to wit: larceny; to unlawfully, willfully and feloniously steal, take, and carry away two coon dogs of George O. Gunter of the value of $350.00, with the felonious attempt to permanently deprive the

owner thereof and convert the same to his own use (R. pp. 15, 31).

The warrant of arrest, upon which the officer and George O. Gunter were proceeding, was not supported by an affidavit stating facts as a basis for the arrest warrant (R. p. 31).

The arrest warrant was obviously invalid since it did not contain the factual basis necessary to support the search and seizure of the leash. *Giordenello* v. *United States,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958), *Whiteley v. Warden of Wyoming Penitentiary,* 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).

The search warrant used as a basis for the search stated that the leash was located in the petitioner's automobile at the residence of the petitioner and his mother; and the facts upon which this information was based was obtained from "personal information from George O. Gunter, 2124 New Walkerton Road, Winston-Salem, North Carolina, owner of the property in question who had seen the property in question and subject's vehicle at the above location" (R. pp. 28, 29).

The burden is upon the State to prove any waiver of Constitutional rights to be freely and intelligently given without coercion, duress, or fraud; and the presumption is against the waiver of fundamental rights.

There was a sharp conflict between the State's witnesses, Weaver and Wilson as to whether Mrs. Brannon's consent to search was limited to the house or whether it encompassed the entire premises. Officer Weaver, who made the illegal search of the vehicle within the curtilage, stated that Mrs. Brannon's consent to the search was limited to permission to look in the

house for the petitioner Brannon (R. p. 10). Officer Wilson stated that Mrs. Brannon gave Officer Wilson the right to search any place he wanted to (R. p. 17).

Hattie H. Brannon, mother of the petitioner, testified that she did not give the officers permission to search anywhere before they obtained the search warrant (R. pp. 32, 33).

It, therefore, is without caval that what ever consent Mrs. Brannon gave was limited personally to Officer Wilson and did not extend to Officer Weaver. Officer Weaver's own testimony limited the consent to search to the house itself; and the search that he made of the vehicle within the curtilage of the home was completely without the consent of Mrs. Brannon, who according to Weaver's testimony, as heretofore stated, was limited to the house.

It, therefore, is clear that Mrs. Brannon's consent as far as Officer Weaver, who made the search, was concerned was limited to the house itself.

However, there is no doubt that the officers obtained whatever consent they did receive because of the coercion of the invalid arrest warrant (R. pp. 17, 31).

The alleged consent was no more than acquiescence to a claim of lawful authority under the coercion of an invalid warrant.

The Conclusion of Law Number 2 of the trial Court (R. p. 43) that Mrs. Hattie Brannon voluntarily consented to allow the law enforcement officers to search the premises, including the home itself and the curtilage of the automobile, is without basis of fact and is completely contrary to the legal authorities which will be hereinafter discussed.

It is uncontradicted that at the time the defendant gave his alleged consent to search, he was under arrest (R. pp. 19, 20). Also see Finding of Fact 16 of the trial (R. p. 42). The testimony of Mary B. Thompson that after the defendant was arrested out on the street, he was handcuffed, is uncontradicted (R. p. 35).

The officers' claim of consent of the defendant to search the vehicle was sharply disputed by Mary B. Thompson and Vera Brannon, who testified that the defendant did not give the officers permission to search (R. pp. 35, 38).

After the defendant was put under arrest under the void arrest warrant, the officer stated that he gave permission to search and gave the conclusion that he helped; however, the officers were unable to state any act that defendant did to help unlock the trunk except to say, "Go ahead, open it. Do it; you can do what you want to," and "Let's go over there and open it up" (R. pp. 20, 22).

Certainly, the foregoing words do not amount to assistance in opening the trunk, but are only another way of saying that the defendant consented and, therefore, there was no basis whatsoever for the finding of the Court that the defendant "assisted" in opening the trunk. (Finding of Fact 16) (R. pp. 42, 43).

Although the officers testified that the defendant helped them get into the trunk (R. p. 22), there was no explanation of what he did to help or how he could have helped with the handcuffs on (R. p. 35), or the handcuffs behind his back (R. p. 35).

Although possibly the fact that the defendant is under arrest does not, standing alone, render the consent invalid, 9 ALR 3d 875-876, and the warnings required

in *Miranda* v. *Arizona,* 384 US 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) are not obligatory before obtaining consent to search, however, the fact that the defendant consents after arrest, tends to indicate that the consent was not voluntary. 9 ALR 3d 875-876.

Many cases state or recognize that the burden on the government to prove the voluntary nature of a consent to a search is particularly heavy where the consenter was under arrest at the time of the consent. 9 ALR 3d 876.

Where in addition to the circumstance that the consenter was under arrest at the time of an allegedly involuntary consent to a search, other factors, such as handcuffing, appear, the unlikelihood that the consent was freely made is considered by the Courts as strong. 9 ALR 3d 877.

Here not only was the defendant under arrest at the time of the alleged consent but was handcuffed and the officers were proceeding under an invalid arrest warrant in addition to an invalid search warrant.

The incredible statement of these overzealous officers that the defendant helped in the search of the automobile is certainly too incredulous to tip the scales against the presumption of non-waiver of constitutional rights.

Here the officers not only served the invalid search warrant but introduced it into evidence (R. pp. 28-30).

As was said in *Hoover* v. *Beto,* 439 F.2d 913 (5th Circuit 1971) at page 920:

> "The officer's return on the back of the search warrant is record evidence that the search was conducted in reliance on the warrant. Conceding *argu-*

endo, however, that the search can be justified on the basis of consent, we cannot agree that Hoover voluntarily consented to the search."

In *Hoover* v. *Beto, supra,* the Court further said, at page 920, as follows:

"It is conceivable that a person could give a voluntary and uncoerced consent to search even though he had been informed that the officers had a search warrant. But the state would bear the burden of showing that the consent was given sufficiently independent of the warrant to remove the taint of its coercive nature."

In the case of *Bumper* v. *North Carolina,* 391 US 543, 20 L.Ed.2d 797, 88 S.Ct. 788 (1968), the United States Supreme Court, in reversing the conviction of Bumper and in holding that there could be no consent after the official conducting the search asserted he possessed a warrant, said:

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he had the burden of proving that the consent was in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out the warrant was invalid. The result can be no difference when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show there was in fact any warrant at all.

"When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion-albeit, colorably lawful coercion. Where there is coercion, there cannot be consent."

Here the defendant was under the coercion of an invalid warrant and an invalid search warrant, and any statement or act that he made pursuant thereto was colorably coercion pursuant to a show of lawful authority by the officers; and the State has not borne its burden of showing that the consent was sufficiently independent of the illegal warrant and the illegal search warrant to remove the taint of its coercive nature.

From the foregoing facts and authorities, it appears to be crystal clear that there was no basis in law or in fact for the Conclusions of Law 2 and 5 of the trial Court (R. pp. 43, 44) that Hattie Brannon and the defendant voluntarily consented to the search. The State failed to carry its burden and showed no more than acquiescence to a claim of lawful authority. Certainly, the State has not carried its burden sufficiently to show that the consents were independent of the warrants to remove the taint of the invalid warrants' coercive nature.

Schneckloth v. *Bustamonte,* 412 US 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973) is of no help whatsoever to the State's contention. Neither of these cases involves consent given after arrest or consent given after a show of lawful authority, either by an arrest warrant or a search warrant. The real issue in *Schneckloth* v. *Bustamonte,* supra, was whether there was a duty on the part of the officer to warn a person consenting to a search of his right not to consent.

In this case now before the Court, the Hattie Brannon alleged consent was acquiescence to claim of lawful authority, which turned out to be an invalid warrant; and the alleged consent on the part of the defendant was an acquiescence to a claim of lawful au-

thority, which turned out to be an invalid arrest warrant and an invalid search warrant.

The initial discovery of the leash did not justify the invoking of the "plain view" doctrine, because the officers did not have the right to search as heretofore set forth.

But even if the officers had the authority to be in the curtilage where the petitioner's automobile was standing, which is denied, the "plain view" doctrine would not apply; because the officers did not discover the leash inadvertently, but through a general exploratory search of the petitioner's automobile. Officer Weaver testified that while looking for the petitioner under the void and deficient arrest warrant, he shined his light through a crack in the trunk lid and saw the leash, which was not identified by Gunter at that time. [See finding of facts 12, 13, 14 and 15 (R pp 41-42)].

The search described by the officer was not inadvertent, but a general exploratory search, and the "plain view" doctrine did not apply. In *Coolidge* v. *New Hampshire,* 403 US 443, 29 L Ed 2d 564, 91 S Ct 2022 (1971), the Supreme Court of the United States said at page 466 as follows:

> "Finally, the 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object."

The Court in *Coolidge* v. *New Hampshire* further stated at page 466:

> "The 'plain view' doctrine may not be used to extend a general exploratory search from one ob-

> ject to another until something incriminating at last emerges."

Also, the "plain view" doctrine does not apply where the incriminating nature of the evidence discovered was not apparent by mere inspection. (Annotation 29 L Ed 2d 1067 at page 1073, concerning Opinion, *Stanley* v. *Georgia,* 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), page 571.

Here the evidence and the finding of facts by the Court disclose that the identity of the leash was not established before the search warrant was procured. [See finding of facts 12, 13, 14 and 15 (R pp 41-42)].

The North Carolina Court of Appeals, by deciding that the petitioner could now show that the allegations in the affidavit supporting the search warrant were invalid, swept under the rug the clear fact that the search warrant was based on illegally obtained evidence. The evidence of the dog leash was barred as fruits of the poisonous tree under *Silverman* v. *United States,* 365 U. S. 505, 5 L. Ed. 2d 734, 81 S. Ct. 679 (1961), *Wong Sun* v. *United States,* 371 U. S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963), *Alderman* v. *United States,* 394 U. S. 165, 22 L. Ed. 2d 176, 89 S. Ct. 961 (1969), *Silverthorne Lumber Company* v. *United States,* 251 U. S. 385, 64 L. Ed. 2d 319, 40 S. Ct. 182 (1920). *Brown* v. *Illinois,* 17 Cr. L. 3145 (1975).

The denial of the petitioner's right to show that the evidence upon which the search warrant was based was illegal is a complete repudiation of the doctrine of the fruits of the poisonous tree, unless this court hears this case and repudiates the decision of the North Carolina Court of Appeals, a precedent will be set not only in North Carolina but in other states which will

encourage officers to make an illegal search, discover evidence during the illegal search and have the search declared legal because of the inability of the victim of the search to show the true illegal origin of the facts shown in the search warrant affidavit.

2. Not only was the search warrant used as an authority for the search and seizure of the leash invalid as a fruit of the poisonous tree but the search warrant was clearly invalid because it was issued without an affidavit.

The search warrant was issued at 1:20 a.m., but the affidavit upon which the search warrant was based was not sworn to until 1:30 p.m. (R. pp. 28-30). The search warrant and the affidavit show on their face that at the time the search warrant was issued, the affidavit supporting the same had not been sworn to. In fact, the search warrant and the affidavit show on their face that the affidavit was executed and sworn to more than 12 hours after the search warrant was issued.

The trial judge made no findings of fact that the affidavit was signed before the issuance of the warrant (R. pp. 39-43), and the testimony of the witness Paul G. Wilson who signed the affidavit, as shown on R. p. 19, contains no statement that he signed the affidavit before the warrant was issued.

Actually, the testimony of the witness Wilson shows that the officers were in such a hurry that the affiant signed the search warrant in the magistrate's place and the magistrate signed the warrant in the affiant's place. With all this going on, it is reasonable to assume that the affidavit was not signed prior to the execution of the search warrant and that it was signed

at a later time as shown on the face of the warrant and affidavit (R. p. 19).

Certainly there are no facts which justify the decision of the North Carolina Court of Appeals that "the trial Judge's finding and conclusion that the search warrant 'was issued upon probable cause as set out in the Affidavit to obtain the warrant' is supported by evidence adduced at the voir dire hearing and is conclusive on appeal."

Judge Exum's Conclusion of Law No. 4, wherein he stated "the search warrant offered in evidence as State's Exhibit 2 was issued upon probable cause as set out in the Affidavit to obtain a search warrant as amplified by the testimony of Chief Wilson at the voir dire hearing and is a valid search warrant notwithstanding the fact that the magistrate signed the warrant in the space set aside for the affiant and that Chief Wilson signed in the space set aside for the signature of the magistrate (R. p. 44) is not based upon any finding of fact or any evidence that the affidavit to obtain the search warrant was not executed at the time set forth on the face of the warrant.

Actually, the judge's Conclusion of Law No. 4 was not intended to cover the lack of an existing affidavit at the time of the issuance of the search warrant, but specifically referred to the mix-up in the signatures on the warrant itself.

The search warrant was invalidly issued without an affidavit, and for this reason the North Carolina Court of Appeals committed error in its decision contrary to the decision of this Court in *Aguilar* v. *Texas,* 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964).

Actually, it would seem that if the petitioner is to be precluded, as the North Carolina Court of Appeals held, from contesting the facts set forth in the affidavit as to truth and as to whether illegally obtained, that the petitioner should be fed out of the same spoon as the State; and the State should be bound by the facts shown on the face of the warrant and affidavit. This principle is particularly applicable in this case, because there was no factual testimony that the times set forth in the affidavit and warrant were not correct and the findings of fact by the judge on this point and even the Conclusion of Law relied on by the Court of Appeals does not specifically address itself to the curing of this fatal defect shown on the face of the affidavit and search warrant.

II. The decision of the North Carolina Supreme Court dismissing the appeal and the petition for certiorari to the North Carolina Supreme Court, from the decision of the North Carolina Court of Appeals decided a question of substance not theretofore determined by this Court.

In addition to allowing the fruits of the poisonous tree to become evidence in this case by precluding the petitioner from showing the illegal source of the evidence, contrary to the decisions of this Court, the North Carolina Court of Appeals also closed the door upon the right of the petitioner to show the truth of the facts set forth in the search warrant affidavit.

The decision of the Court of Appeals gives carte blanche to officers to make false statements in the affidavit and then blandly prevent the victim of the search from showing the falsehood because it does not appear on the face of the affidavit supporting the search warrant.

A diligent search by counsel for the petitioner has not disclosed any decision by this Court upon this important point of law.

68 Am. Jur. 2d *Search and Seizures* § 66 sets forth that the Supreme Court of the United States has not directly passed upon this question. Some state courts have taken the view that the credibility of the affiant cannot be disputed and other state courts have held to the contrary.

The rule generally followed in federal courts is well-stated in *United States* v. *Hunt,* 396 F. 2d 888 (5th Cir. 1974). This case clearly states that the truth of the affidavit can be inquired into, and if the false statements are intentional, the warrant is invalid whether or not the statements are material to probable cause. If the warrant contains false statements not intentionally made to mislead, but are material to the establishment of probable cause, the material falsehoods must be excised from the warrant and the remaining information examined to see if it independently constitutes probable cause.

The search warrant for the petitioner's white Oldsmobile stated that a leather dog leash, which had been used in the commission of the crime of larceny of dogs, was located in the petitioner's automobile at the residence of petitioner and his mother; and that the facts upon which the informaiton was based, was obtained from "personal information from George O. Gunter, 2124 New Walkertown Road, Winston-Salem, North Carolina, owner of the property in question who has seen the property in question and subject's vehicle at the above location" (R. pp. 28, 29).

The evidence that the facts set forth in the affidavit supporting the search warrant were so overwhelmingly

false that the trial Judge found that Gunter could not make a positive identification looking in through the hole in the trunk lid (Findings of Fact 14), (R. p. 42).

The trial judge made this finding of fact that Gunter could not make a positive identification, because Gunter had testified on a previous trial that he did not look into the trunk until it was opened, and that was when the officers came back with the search warrant; until then, he did not get close to the car or look into it (R. p. 32).

The best that Gunter could do at the second trial, after listening to the officers testify, was to change his testimony to state that he did see into the car trunk through the hole in the trunk while the car was in the petitioner's backyard and within the curtilage and before the search warrant was obtained; but he did not recognize the leash and identify it as set forth in the affidavit from which the search warrant was obtained; and he did not tell the officers that the leash was his at the time (R. pp. 27, 28).

There is absolutely no basis for the finding of the Court that "Gunter remarked to Deputy Sheriff Weaver, 'that appears to be my leash', or words to that effect . . . " (Finding of Fact 14) (R. p. 42).

Actually, Gunter's testimony on this point, although it was changed drastically to please the police officers, was as follows:

> "After the trunk was opened, I saw this leash that I could identify. Through the hole, I saw some collars and a leash, but I couldn't fully identify the leash until we got the trunk opened. But, it looked like it when I saw it through the hole. I saw the leash when the trunk was opened." (R. pp. 27, 28)

It is perfectly obvious if Gunter thought that it was his leash, he kept it to himself and did not identify it to the officers. When the police officer went before the magistrate and swore to the affidavit which supports the search warrant, he stated an untruth when measured by the testimony of Gunter, both at the first and the second trials. The court was completely in error in finding that he remarked to the Deputy Sheriff, "That appears to be my leash," or words to that effect.

The finding of the court that Gunter made the foregoing remarks to the Deputy Sheriff is a complete contradiction of the facts set forth in the warrant which unequivocally state that Gunter furnished personal information that he had seen the property in question located in petitioner's automobile located at the residence of petitioner and his mother (R. p. 28).

The learned trial judge did not have any basis for his finding of fact set forth above, because Forsyth County Deputy Sheriff Weaver testified that Gunter said, "That is my dog leash" (R. p. 12) and Chief of Police Wilson stated that Gunter saw the dog leash (R. p. 19).

It is therefore uncontradicted that Gunter did not tell the officers anything, and that Wilson swore to what he wanted the facts to be, rather than what they were.

At the time Officer Wilson swore that Gunter had seen the property in question in the subject's vehicle at the location described, he had no basis whatsoever to make such a statement, which he stated was upon personal information from George O. Gunter. The statement was false, and without this information from Gunter, there was no probable cause to believe that the

leather leash used in commission of a crime was in the petitioner's automobile at 400 block Southern Street, East Spencer, North Carolina.

It is important that state courts not be allowed to emasculate the Fourth Amendment prohibition against unreasonable search and seizure by the devices that have been used in this case. It is important not only for this cause but for all causes in the future that this court consider and pass upon the right of the petitioner to attack the credibility of the affiant and it is respectfully submitted that *United States* v. *Hunt, supra,* sets forth the desirable rule. In any event, it is important that this court now speak out on this important issue which, in the petitioner's case, and in the case of others will prevent the state courts from circumventing the prohibition of the Fourth Amendment to the Constitution of the United States against unreasonable search and seizure.

CONCLUSION

For the foregoing reasons, a writ of certiorari to review the judgment of the North Carolina Court of Appeals should be allowed.

Respectfully submitted,

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APPENDIX

EXHIBIT A

No. 22

TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1975

Judgment Dismissing Appeal and Denying Certiorari

No. 7521SC126

STATE OF NORTH CAROLINA

v.

CALVIN LOUIS BRANNON

This matter came on to be considered upon motion of the Attorney General to dismiss the appeal of the defendant and upon defendant's petition for writ of certiorari; upon consideration whereof, it is adjudged by the Court here, that the motion to dismiss the appeal be allowed; that the petition for writ of certiorari be denied, and that it be so certified to the North Carolina Court of Appeals to the intent its decision be affirmed; the order for stay of execution of the judgment heretofore entered is hereby dissolved.

And it is considered and adjudged further that the defendent and surety to the appeal bond, United States Fidelity and Guaranty Company, do pay NINE AND NO/100 ($9.00) DOLLARS and execution issue therefor.

Witness my hand and the seal of the Supreme Court, this 26th day of June, 1975.

ADRIAN J. NEWTON
Clerk of the Supreme Court of North Carolina

By:
/s/ John R. Morgan
Assistant Clerk

EXHIBIT B

No. 7521SC126

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 1975

Forsyth County

No. 72CR47396

STATE OF NORTH CAROLINA

v.

CALVIN LOUIS BRANNON

Appeal by defendant from Exum, Judge. Judgment entered 17 September 1974 in Superior Court, Forsyth County. Heard in the Court of Appeals 16 April 1975.

The defendant, Calvin Louis Brannon, was charged in a warrant proper in form with the misdemeanor larceny of three dogs belonging to George O. Gunter.

The defendant pleaded not guilty but was found guilty by the jury. From a judgment that he be imprisoned for eighteen months, defendant appealed.

Attorney General Edmisten by Associate Attorney Raymond L. Yasser for the State.

Blanchard, Tucker, Twiggs & Denson by Irvin B. Tucker, Jr., for defendant appellant.

HEDRICKS, *Judge.*

Defendant assigns as error the denial of his motion to suppress any and all evidence regarding a leather dog leash seized pursuant to a search of the trunk of his automobile. After an extensive voir dire hearing on the defendant's motion to suppress, the trial court made detailed findings and conclusions, which included the following:

> "4. The search warrant offered in evidence as State's Exhibit Number Two was issued upon probable cause as set out in the affidavit to obtain the warrant as amplified by the testimony of Chief Wilson at the voir dire hearing and is a valid search warrant notwithstanding the fact that the magistrate signed the warrant in the space set aside for the affiant and that Chief Wilson signed in the space set aside for the signature of the magistrate."

Citing G. S. 15-26 which requires that a search warrant be signed by the issuing officer, the defendant argues that the search warrant in the instant case was not "properly signed" because the Chief of Police signed the search warrant and not the magistrate. The search warrant shows on its face that it was signed by the magistrate at the place set aside for the affiant and that the Chief of Police signed it at the place set aside for the magistrate. G. S. 15-27(b) provides that mere technical deviations in a search warrant does not invalidate the warrant. Clearly, the fact that the issuing magistrate's signature was misplaced on the warrant is a mere technical deviation, which does not invalidate the search warrant.

Next, the defendant contends the search warrant was issued "without affidavit," because the affidavit indicates that it was signed at 1:30 p.m., while the search itself shows on its face that it was issued at 1:20 a.m. While the record indicates that the affidavit was actually signed subsequent to the signing of the search warrant, the trial judge's finding and conclusion that the search warrant "was issued upon probable cause as set out in the affidavit to obtain the warrant" is supported by evidence adduced at the voir dire hearing and is conclusive on appeal. State v. Wingard, 9 N.C. App. 719, 177 S.E.2d 330 (1970), appeal dismissed, 277 N.C. 459, 178 S.E.2d 226 (1971).

Finally, defendant contends that the evidence in the affidavit to establish probable cause for the issuance of the search warrant was illegally obtained. In State v.

Harris, filed 16 April 1975, Judge Clark, speaking for this court, said:

> "We adopt the majority rule that where the search warrant is valid on its face, and the sworn allegations are sufficient to establish probable cause, the defendant may not dispute and attack the allegations, or the credibility of the affiant or his informant, in the voir dire hearing on the defendant's motion to suppress the evidence seized by law officers pursuant to the search warrant. State v. Salem, 17 N.C. App. 269, 193 S.E.2d 755 (1973), *cert. denied*, 283 NC. 259, 195 S.E.2d 692 (1973). See also Annot., 5 A.L.R.2d 394 1949)."

Therefore, since the search warrant is valid on its face and the sworn allegations in the affidavit are sufficient to establish probable cause, it is not necessary for us to discuss the validity of the allegations in the affidavit or the credibility of the affiant. We hold the search of the defendant's automobile and the seizure of the leather dog leash pursuant to the search warrant was proper and the trial court did not err in denying the defendant's motion to suppress the evidence.

Defendant attacks other findings and conclusions of the trial court sustaining on other grounds the validity of the search and seizure; however, in view of our decision holding that the search warrant is valid, it is not necessary for us to discuss these contentions. Defendant's one assignment of error is overruled.

No Error.

Judges Britt and Martin concur.

EXHIBIT C

No. 22

Twenty-First District

SUPREME COURT OF NORTH CAROLINA

Fall Term 1975

State of North Carolina

v.

Calvin Louis Brannon

Notice of Appeal and Petition for Writ of Certiorari to North Carolina Court of Appeals To Review Its Decision

(Filed June 2, 1975)

Notice of Appeal

To: The Clerk of the Court of Appeals, The Clerk of the Supreme Court, and the Attorney General of the State of North Carolina:

Take Notice that the defendant appellant hereby gives Notice of Appeal to the Supreme Court of North Carolina, from the decision of the North Carolina Court of Appeals rendered herein, filed on May 7, 1975, and certified by the Clerk of the Court of Appeals on the 19th day of May, 1975.

This appeal is taken as a matter of right pursuant to North Carolina General Statutes 7A-30(1) from a decision involving a substantial question arising under the Constitution of the United States as follows:

(1) The defendant appellant Brannon's right against unreasonable search and seizure guaranteed by the Fourth Amendment to the Constitution of the United States made obligatory on the States by the Fourteenth Amendment was violated.

(2) The court overruled the defendant's motion to suppress and objections to the evidence of a dog leash found

locked in the trunk of the defendant's automobile while the automobile was in the yard of the defendant's mother, where defendant also lived, even though the search which resulted in the seizure of the leash was illegal and in violation of the defendant's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States.

(3) The evidence of the dog leash was highly prejudicial to the defendant appellant Brannon, and without this evidence, the defendant's conviction cannot be upheld.

(4) The defendant did not waive the necessity of a valid search warrant.

(5) The officers violated what is known as the doctrine of the fruits of the poisonous tree, which forbids the use of illegally obtained evidence in the use of a search warrant in that they used the evidence illegally obtained from the trunk of the defendant's automobile in the affidavit to support the search warrant.

(6) The officers, when they found the leash in the trunk of the defendant's automobile, were illegally searching under a void arrest warrant.

(7) The officers, when they found the leash locked in the trunk of the defendant's automobile, were searching under the authority of an arrest warrant which was not supported by an affidavit sufficient to allow the search and seizure of property locked in the trunk of the defendant's vehicle.

(8) The defendant's vehicle, at the time of the search, was within the curtilage of the yard where the defendant and his mother lived.

(9) The defendant is the person aggrieved by the search.

(10) The search warrant was issued without a prior affidavit.

(11) The warrant and affidavit show on their face that the affidavit was sworn to more than twelve hours after the search warrant was issued.

(12) The constitutional question was raised in the trial court by a motion to suppress evidence of the dog leash and by objections to the evidence when the same was introduced at the trial.

(13) The officer, who first found the leash locked in the trunk of defendant's vehicle, was a Forsyth County Deputy Sheriff with no authority to search in Rowan County.

(14) The search warrant was based on false statements contained in the supporting affidavit.

(15) "Plain view" doctrine did not apply because the discovery of the leash locked in the trunk of the automobile was not inadvertent, and the incriminating nature of the leash was not apparent when first seen locked in the trunk of the vehicle through a hole in the trunk.

(16) The defendant's motion to suppress, which was heard on voir dire prior to the trial, is hereto attached, marked "Exhibit A", and made a part of this Notice of Appeal.

(17) The constitutional question was raised in the North Carolina Court of Appeals by assignment of error and as the first and only point of defendant appellant's brief filed with the North Carolina Court of Appeals. The defendant appellant's argument below is set forth in defendant appellant's brief filed with the North Carolina Court of Appeals, pages 6-35.

(18) In the trial court and in the North Carolina Court of Appeals, this constitutional question was passed upon and decided erroneously by the trial court and the North Carolina Court of Appeals.

This Notice of Appeal is being given within fifteen days of the date of the certification of the Opinion of the Court of Appeals.

This the 2nd day of June, 1975.

Respectfully submitted,

BLANCHARD, TUCKER, TWIGGS & DENSON

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FILED
JUN 2 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-454

CALVIN LOUIS BRANNON,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The North Carolina Court of Appeals, at 25 N. C. App. 635, 214 S.E. 2d 213 (1975), found "no error" in Calvin Brannon's trial for larceny of the Gunter dogs. Calvin Brannon petitioned the Supreme Court of North Carolina for a Writ of Certiorari in the North Carolina Court of Appeals and also purported to appeal as of right from the Court of Appeals' decision pursuant to N.C. G.S. §7A-30(1). Upon answer by the Attorney General for the State of North Carolina, the Supreme Court of North Carolina dismissed the appeal and denied the petition for Writ of Certiorari on June 26, 1975. This decision is reported in 287 N.C. 665, ... S.E. 2d ..... (1975).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. IS PETITIONER'S CONTENTION THAT THE STATE OF NORTH CAROLINA VIOLATED THE DOCTRINE OF "FRUIT OF THE POISONOUS TREE" BY ALLOWING THE SEIZED LEASH INTO EVIDENCE GROUNDLESS IN VIEW OF THE ACTUAL CIRCUMSTANCES OF THE SEARCH AND SEIZURE?

2. IS THE PETITIONER'S CONTENTION THAT THE SEARCH WARRANT USED IN THIS MATTER IS FATALLY DEFECTIVE DUE TO A TECHNICAL ERROR ON THE AFFIDAVIT MERITLESS?

3. EVEN IF PETITIONER WERE ALLOWED TO ATTEMPT TO IMPEACH THE FACTUAL AVERMENTS IN THE AFFIDAVIT FOR THE SEARCH WARRANT, WOULD THE AFFIDAVIT STILL SUPPORT A SHOWING OF PROBABLE CAUSE?

STATEMENT OF THE CASE

On January 11, 1973, Petitioner was tried in Forsyth County District Court on two charges of larceny of dogs. Petitioner pleaded not guilty, but was found guilty as to both charges. The warrants were consolidated for judgment and Petitioner was sentenced by the Honorable Robert K. Leonard, District Judge, to imprisonment for eighteen (18) months in the jail of Forsyth County. Petitioner appealed his convictions to the Forsyth County Superior Court where on June 4, 1973, he was given a trial *de novo* on the two charges. The Petitioner again entered pleas of not guilty, but was found guilty by a jury on both charges.

Petitioner appealed his conviction to the North Carolina Court of Appeals which, in a decision reported in 21 N.C. App. 464, 204 S.E. 2d 895 (1974), reversed his conviction as

to one charge, and granted a new trial in the matter now before the Supreme Court.

Petitioner was retried in Case 72CR47396. On July 25, 1974, Petitioner filed a motion to suppress certain evidence seized on October 22, 1973, by law enforcement officials. A *voir dire* hearing on the motion was heard on August 23, 1974 before the Honorable James Exum, Regular Judge of the Superior Court of Forsyth County. After the hearing, Judge Exum made findings of fact and conclusions of law and denied the Petitioner's Motion to Suppress.

On September 16, 1974, the Petitioner was tried, upon a plea of not guilty, for larceny of dogs in Case 72CR47396, and was again found guilty by a jury, and sentenced to a term of eighteen (18) months in the State Department of Correction. Petitioner appealed his conviction to the Court of Appeals which found "no error" in a decision dated May 7, 1975, and reported in 25 N.C. App. 635, 214 S.E. 2d 213 (1975). A petition to the Supreme Court of North Carolina for a Writ of Certiorari in the North Carolina Court of Appeals was denied and a direct appeal to the Supreme Court of North Carolina was dismissed on June 26, 1975, in a decision reported in 287 N.C. 665, ... S.E. 2d ..... (1975).

From this dismissal, Petitioner has filed the present petition for Writ of Certiorari to the Court of Appeals of North Carolina in the Supreme Court of the United States.

RELEVANT FACTS

In early September, 1972, Mr. George Gunter saw Calvin Brannon in the Gunter dog lot with chains around two dogs. When Gunter jumped out of his truck, Calvin Brannon jumped over the dog pen fence and ran away (R pp 9, 25). On the basis of this incident, George Gunter swore out a warrant in Forsyth County September 26, 1972, against Calvin Brannon charging him with attempted larceny of dogs (R p 9). As of October 21, 1972, this warrant had not been served on Calvin Brannon (R p 7).

On October 21, 1972, George Gunter and his Brother Charles, put three dogs, one belonging to George and two belonging to Charles, in the dog box of a pick-up truck in preparation for some hunting (R p 24). One of the dogs had a homemade leash, made by Charles, fastened to its collar (R p 24).

After placing the dogs in the dog box (about 7:30 p.m.), the Gunter brothers went inside George Gunter's house to have some coffee and change clothes (R p 24). When the brothers went back outside, the dogs were gone (R p 24). Charles Gunter had seen Brannon's car in the vicinity of George Gunter's home just before the theft (R pp 8, 13).

George Gunter notified Deputy Sheriff Weaver of the Forsyth Sheriff's Department of the theft and of his brother's sighting Brannon in the area (R p 8). Deputy Weaver and Gunter then went to East Spencer where they contacted the Chief of Police, Paul Wilson, who had been investigating Brannon due to other complaints about missing dogs and Calvin Brannon (R p 18).

Later that evening, Mr. Gunter, Deputy Weaver and Chief Wilson went to the home of Hattie Brannon (petitioner's mother) where Calvin Brannon sometimes lived (R p 10). Upon arriving at the home, the officers asked for Calvin Brannon. Mrs. Brannon said he was not there. The officers asked if they could look for Mr. Brannon, and Mrs. Brannon gave them permission and assisted in letting the officers in her home (R pp 10, 17). This search of the premises did not result in the finding of Calvin Brannon. However, while looking for Brannon in the area of Brannon's car, Deputy Weaver noticed some leashes—one resembling the leash made by Charles Gunter—in the trunk of Brannon's car (R p 12). These leashes were plainly visible due to a "a breathing hole made for breathing purposes where a dog or person could breathe. Looked like it had been jacked or prized open where they could get air through the car itself. The hole was of sufficient size that you

could see from outside into the trunk." (R p 20). George Gunter then looked at the leash through the hole in the trunk and stated that it resembled his brother's leash (R p 28). Deputy Weaver then opened the trunk to seize the leash, but Chief Wilson insisted upon getting a search warrant first (R p 16). By the time Wilson came back from Salisbury with this warrant, Calvin Brannon. who had been spotted coming out of some woods behind his Mother's home, had been detained (R p 19). Chief Wilson placed Brannon under arrest for attempted larceny of dogs and warned him of his rights pursuant to MIRANDA v. ARIZONA, 384 U.S. 436 (1966). Then, *before telling him about the search warrant*, but just after he had been warned of his rights, Chief Wilson requested permission from Calvin Brannon to search the automobile (R p 20). This permission was granted, Brannon saying "go ahead, lets do it. Open it up. Do what you want to do" with Brannon actually assisting in the search (R p 22). Brannon's sister testified that he was handcuffed at the time, but Chief Wilson testified, "I don't believe he was handcuffed on the street because he helped unlock the trunk and was there when we unlocked the trunk, but I don't recall." (R p 22). This consent of Brannon's was later denied—not by Brannon, who did not testify on *voir dire*—but by his sisters who were present during some of the arrest and search. The leash found in the trunk was positively identified by George Gunter as his brother's leash (R p 26).

REASONS FOR DENYING THE WRIT

I.

THE SEARCH AND SEIZURE COMPLAINED OF IN THIS MATTER WAS LEGAL; THEREFORE THE FRUIT OF THE POISONOUS TREE DOCTRINE IS INAPPLICABLE.

Calvin Brannon, the Petitioner herein, has mounted a multifaceted attack on the search conducted on the premises of his mother's home on October 22, 1972, which resulted in the

seizure of highly incriminating evidence against him. He claims that the "fruits of the poisonous tree" doctrine of WONG SUN v. UNITED STATES, 371 U.S. 471 (1963) precludes the use of this evidence. However, when the facts as elicited during the voir dire in this matter are examined, it is clear that the decision of the North Carolina Court of Appeals does not conflict with any decisions of this Supreme Court.

Petitioner first alleges that the police had no right to search incident to a lawful arrest, because the arrest warrant the police possessed was void for lack of probable cause. In support of his argument Petitioner relies on GIORDENELLO v. UNITED STATES, 357 U.S. 480 (1958), and WHITELEY v. WARDEN OF WYOMING PENITENTIARY, 401 U.S. 560 (1971). However, Petitioner's reliance on these cases is inappropriate on the facts of the present matter. In WHITELEY, supra, the arrest warrant was found on the basis of the record not to support probable cause where the complaint consisted of nothing more than the complainant's conclusion that a burglary occurred and where the record showed that the complainant relied entirely on an informer's tip. The arresting officers had no independent probable cause aside from the warrant to arrest Whiteley. In the present matter, the complainant is the owner of the dogs and saw Brannon attempt the theft. Thus, he was acting on direct knowledge when he swore out the warrant. The arresting officers had sufficient independent corroborative evidence to support the arrest; the complainant was with the officers and both officers knew the details of Brannon's attempted larceny. Therefore, unlike the officers in WHITELEY v. WARDEN OF WYOMING PENITENTIARY, supra, the officers had sufficient probable cause to arrest on the attempted larceny matter aside from the warrant.

Even if the warrant were void, the law enforcement officers were still lawfully on the premises of the Brannon home because there was probable cause for the initial entry, consent for the initial inspection, initial discovery in plain view, and

ultimate seizure pursuant to a valid consent and warrant. Mr. Gunter's and his brother's dogs had just been stolen. Brannon, who had earlier been caught in Gunter's dog pen, was seen in the vicinity of the larceny shortly before the larceny, and Chief Wilson had Brannon under observation due to complaints about missing dogs and Brannon's apparent implication in these disappearances. These facts certainly constituted probable cause for the law enforcement officers initially to investigate Brannon in connection with the theft of the Gunter dogs, and provided a valid reason for the officers to go to the Brannon residence separate and apart from serving the warrant for attempted larceny.

When Deputy Weaver and Chief Wilson got to the Brannon home, Mrs. Brannon clearly consented to the officers' search of the premises for Calvin Brannon who she said was not home. A search authorized by consent is, of course, wholly valid. ZAP v. UNITED STATES, 328 U.S. 624 (1946) Both officers, the witnesses least likely to have a strong personal outcome in this matter, testified that Mrs. Brannon advised them that the officers could look for Calvin Brannon, and Chief Wilson testified that Mrs. Brannon assisted in letting them in the house (R p 17). There is no testimony on *voir dire* that the officers attempted to threaten Mrs. Brannon or her daughters, or asserted a legal right to search. They did not claim to have a search warrant or anything that would give them such authority; they merely stated they had an arrest warrant, a process that gives no authority to search on its face. Thus, Brannon's assertion that his mother's actions were mere acquiesence in a claim of lawful authority as found in BUMPER v. NORTH CAROLINA, 391 U.S. 548 (1968) is not based on fact. Further, it is not even consistent with the defense at trial for there, Mrs. Brannon testified that she did not give the officers permission to search at all (R pp 32, 33). Therefore, since Mrs. Brannon had consented to the search, when Deputy Weaver began looking into the petitioner's car parked in her yard, he was in a place where he had a

lawful right to be.

During the course of this inspection from outside the car, Deputy Weaver first ascertained that Brannon was not hiding in the seat of the car (R p 12). Then he noticed that the trunk lid "had a place bent up in it" (R p 12) through which he could plainly see into the trunk .When he looked into it, he saw many leather leashes, one of which matched the description Gunter had given to his brother's leash. Therefore, the leashes were not "fruit of the poisonous tree" since "[i]t has been long established that objects falling in plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." HARRIS v. UNITED STATES, 390 U.S. 234, 236 (1968). The applicability of this principle is unchanged by COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443 (1971). While it is true that the search itself was not inadvertent, the law enforcement officers were looking for Calvin Brannon, not making a general exploratory search for evidence and in the course of looking for the Petitioner, Deputy Weaver did inadvertently come across the evidence. This places the instant case within the holding of WARDEN v. HAYDEN, 387 U.S. 294 (1967).

After Mr. Gunter confirmed that the leash appeared to be his (R pp 12, 27-28), Chief Wilson got a search warrant from the Rowan County Magistrate. Before he returned to the Brannon home with it however, Calvin Brannon came out of the woods behind his mother's house whereupon he was placed under arrest and given warnings pursuant to the *Miranda* case. When Chief Wilson arrived, he asked petitioner for permission to search the car, which permission petitioner granted saying "Go ahead, open it. Do it. You can do what you want to." (R p 22). Only after being told this did Chief Wilson then inform Brannon that he also had a search warrant (R p 23). On these facts, the trial judge properly found that Calvin Brannon had consented to this search. Even though his consent was obtained after arrest and may be somewhat suspect

on this ground, the fact of arrest alone does not preclude a voluntary consent, for voluntariness "is a fact to be determined from all the circumstances," SCHNECKLOTH v. BUSTAMONTE, 412 U.S. 218 (1973).

Thus, Petitioner's claim that the introduction of the leash into evidence constituted a violation of the fruit of the poisonous tree is meritless. Both searches involved were sanctioned by the consent of either Brannon or his mother, and even if Brannon's consent was not considered not voluntary, the search warrant was based upon completely legal evidence supplied to the magistrate by Chief Wilson, and it alone permitted the search as well. Therefore, certiorari should not issue on the basis of this contention.

II.

THE AFFIDAVIT FOR THE SEARCH WARRANT IS NOT FATALLY DEFECTIVE.

The next allegation is that the search warrant was invalid since it was allegedly issued without a supporting affidavit. This assertion is based on the fact that the face of the affidavit recites it was sworn to at 1:30 P.M. although the warrant was issued at 1:30 A.M. However, the facts established on *voir dire* clearly indicate that the information was sworn to by Chief Wilson before the warrant was issued, and that the initials "P.M." were written by mistake. On this basis, the trial court found as a fact that the warrant was issued pursuant to the affidavit (Finding of fact 15 R p 42). Therefore, Brannon's assertion is simply factually incorrect in this regard and his reliance on AGUILAR v. TEXAS, 378 U.S. 108 (1964) is inappropriate. This contention involves only a peripheral inaccuracy which does not invalidate the warrant under either federal law, RUGENDORF v. UNITED STATES, 376 U.S. 528 (1964), or state law, N.C.G.S. 15-27(b) and does not warrant the issuance of writ of certiorari.

III.

THERE ARE NO FALSE STATEMENTS IN THE SEARCH WARRANT.

Of main interest legally in the instant writ is the question of whether or not impeachment of factual averments in an affidavit should be allowed. The North Carolina Court of Appeals indicated in its review of Petitioner's case that North Carolina continues to follow the majority rule of not allowing such impeachment, c.f. Mr. Justice White's dissent in NORTH CAROLINA v. WRENN, 417 U.S. 973 (1974). However, its statement in this regard was dictum and therefore of no consequence in this case. This is because the trial court allowed the impeachment to be made, but after hearing all the evidence, found the facts to be that the affiant had testified to the Magistrate truthfully and in accord with the averments set out in the affidavit for the search warrant (Findings of Fact 14, 15 (R p 42)). Therefore, Brannon's argument is really based on his feeling that Judge Exum should not have believed the testimony of the officers and Gunter on *voir dire*, and is not based on any credible showing of falsity with regard to the evidence on *voir dire*, or any prevention of an attempt to show such falsity. Under these circumstances, a writ of certiorari should not issue to review this matter.

CONCLUSION

For the foregoing reasons the State of North Carolina requests that the petition in the Supreme Court of the United States for a Writ of Certiorari to the North Carolina Court of Appeals be denied.

Respectfully submitted,

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